

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DANIEL F. CUTSHALL,)	
)	
Charging Party,)	Case No. LA-CE-308-H
)	
v.)	PERB Decision No. 1028-H
)	
REGENTS OF THE UNIVERSITY)	December 9, 1993
OF CALIFORNIA,)	
)	
Respondent.)	

Appearance; Daniel F. Cutshall, on his own behalf.

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Daniel F. Cutshall (Cutshall) of a proposed decision (attached hereto) by a PERB administrative law judge (ALJ). In that decision, the ALJ dismissed Cutshall's charge that the Regents of the University of California (University) violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by terminating

¹**HEERA** is codified at Government Code section 3560 et seq. Section 3571 states, in pertinent part:

It shall be unlawful for the higher education employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees^ to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

his employment in retaliation for his exercise of protected rights.

The Board has reviewed the entire record in this case, including the proposed decision, hearing transcript, exhibits, briefs filed by the parties and Cutshall's statement of exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.²

DISCUSSION

In order to prove a violation of HEERA section 3571(a), charging party must establish that he participated in protected activity; that the respondent had knowledge of that participation; that the respondent took action adverse to the charging party's interest; and that there was unlawful motivation for that action such that the respondent would not have acted but for the protected activity of the charging party. (Novato Unified School District (1982) PERB Decision No. 210; California State University, Sacramento (1982) PERB Decision No. 211-H.) Cutshall has failed to provide evidence sufficient to establish an unlawful motivation by the University.

On appeal, Cutshall reiterates many of the allegations included in his charge and offered during the hearing in this case. He argues that the evidence relating to his taking a gallon of University gasoline for use in his personal motorcycle clearly indicates that he did not intend to steal the gasoline

²The Board declined to order oral argument in this case.

and planned to reimburse the University for its use. Therefore, Cutshall asserts that the termination of his employment by the University was motivated by something other than alleged employee theft. Cutshall fails, however, to provide evidence which demonstrates that the University's motivation was to retaliate against him for his exercise of protected rights.

Cutshall points to the University's implementation of a stipulated arbitrator's award resulting from a previous grievance as evidence of the University's unlawful motivation. As noted by the ALJ, however, due to the ambiguity of the award language, the University's decision with regard to its implementation is not evidence sufficient to establish retaliatory intent.

Finally, Cutshall reiterates his assertion that the University official who took the termination action against him demonstrated union animus and retaliatory intent. Although the record documents friction between Cutshall and this official, it does not indicate that the official or the University acted in a manner outside of normal procedures or reflective of discriminatory treatment of Cutshall when it decided to pursue termination as a result of his alleged theft of University gasoline. Therefore, this argument is also without merit.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-308-H is hereby DISMISSED.

Chair Blair and Member Garcia joined in this Decision.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DANIEL CUTSHALL,)	
)	
Charging Party,)	Unfair Practice
)	Case No. LA-CE-308-H
v.)	
)	PROPOSED DECISION
REGENTS OF THE UNIVERSITY)	(5/27/93)
OF CALIFORNIA,)	
)	
Respondent.)	
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Appearances: Daniel Cutshall, in pro per; Claudia Cate, Esq., Office of the General Counsel, for the Regents of the University of California.

Proposed Decision by Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A University of California employee dismissed from his job at a remote research station contends here that the termination was wrongfully motivated by his participation in protected activities. The University of California rejects this characterization and asserts that the employee was terminated for the reason stated at the time, theft of one gallon of gasoline.

Daniel Cutshall, a building maintenance worker at the University's White Mountain Research Station, timely filed the charge which commenced this action on January 21, 1992. He filed a first amendment to the charge on June 8, 1992. The general counsel of the Public Employment Relations Board (PERB or Board) followed on July 3, 1992, with a complaint against the Regents of the University of California (University).

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

The complaint alleges that the University retaliated against Mr. Cutshall on or about September 3 and 20, 1991, by terminating him from employment because of his filing of grievances. The complaint alleges that the termination was a violation of Higher Education Employer-Employee Relations Act section 3571(a).¹ The University filed an answer to the complaint on August 12, 1992, denying that it had engaged in any unfair practice in the termination of Mr. Cutshall.

A hearing was conducted in Bishop on November 19 and 20, 1992, and in Los Angeles on January 26 and 27, 1993, before PERB Administrative Law Judge Allen R. Link. With the filing of briefs, the case was submitted for decision on April 26, 1993.²

FINDINGS OF FACT

The Respondent University of California is a higher education employer under HEERA. At the time of his termination,

¹Unless otherwise indicated, all statutory references are to the Government Code. The Higher Education Employer-Employee Relations Act (HEERA) is found at Government Code section 3560 et seq. In relevant part, section 3571(a) provides as follows:

It shall be unlawful for the Higher Education employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

²The case was transferred to the undersigned for issuance of a proposed decision on May 17, 1993. The transfer was made pursuant to California Code of Regulations, title 8, section 32168(b), in order to equalize work loads within the Division of Administrative Law.

Daniel Cutshall was an "employee" of the University as defined in section 3562(f). He was employed as a senior building maintenance worker at the University's White Mountain Research Station. The station, which is located in eastern Inyo and Mono Counties, is administered out of the University's Los Angeles campus (UCLA). During the relevant period, the International Union of Operating Engineers, Local 501, was the exclusive representative of Unit 6, the skilled trades unit at UCLA.

Mr. Cutshall commenced his employment at White Mountain in January of 1977. He was a permanent, full-time employee until he was laid off on October 31, 1988. He returned to work on May 31, 1991, pursuant to a stipulated agreement worked out with an arbitrator who was hearing a grievance about the 1988 layoff. When Mr. Cutshall returned to work in 1991, the University classified him as a casual employee.

The White Mountain Research Station, where the events at issue took place, comprises four separate laboratory sites in the White Mountains near the California-Nevada border. The station headquarters and nearby Owens Valley Laboratory are located three miles east of Bishop. These facilities, which are at an elevation of 4,050 feet, are operated year-round. The three high-altitude facilities are at Crooked Creek, elevation 10,150 feet, Mt. Barcroft, elevation 12,470 feet, and White Mountain Summit station, elevation 14,246 feet. The primary periods of operation for the high altitude facilities are May through October, depending upon the weather.

The White Mountain laboratories are the highest research facilities in North America. They are used by researchers from all University of California campuses and various other universities. The laboratories draw faculty and students performing research in cosmology, geology, archaeology and a broad group of biological sciences.

Because of the remote location, high altitude and difficult road conditions, travel between the Bishop headquarters and the high altitude facilities is arduous and time-consuming. The principal access to the high elevation facilities is through Big Pine, some 15 miles south of Bishop. From Big Pine to Crooked Creek a traveler passes over 28 miles of paved road and eight miles of dirt road. From Crooked Creek to Mt. Barcroft, there are an additional 11 miles of dirt road. Travel times can vary greatly according to the weather. Various witnesses estimated the automobile travel time from Big Pine to Crooked Creek at one hour and 15 minutes to two hours. They estimated an additional 30 to 45 minutes from Crooked Creek to Mt. Barcroft.

The University keeps a supply of gasoline and diesel fuel at Mt. Barcroft and Crooked Creek. The diesel at Barcroft originally was used to fuel generators but now is used for diesel powered vehicles and equipment kept at the high elevations. The gasoline is used primarily to fuel University vehicles kept at the high elevations throughout the season and by researchers who operate their private vehicles out of the mountain laboratories. Gasoline also is sold on occasion to hikers or deer hunters who

are low on fuel. On occasion, gasoline also is sold to University employees although employee use is discouraged because of the high cost of transporting fuel to the high altitude facilities.³ The nearest gasoline station is approximately 35 miles from Crooked Creek.

At about 7 p.m. on August 27, 1991, Daniel Cutshall pumped into his personal motorcycle approximately one gallon of gasoline from the University tank at Crooked Creek. He was observed in this activity by a co-worker, Kevin Ball. The two men exchanged greetings but had no conversation about the gasoline. Mr. Cutshall did not request permission to take the gasoline in advance and did not make a notation about the gasoline in the Crooked Creek fuel log. Neither did Mr. Cutshall mention that he had taken the gasoline in subsequent radio conversations with David Trydahl, the superintendent of the White Mountain facilities.

Mr. Cutshall later told University officials that he did not enter his use of gasoline in the Crooked Creek gasoline log because he did not know where it was.⁴ He told them he had no

³There was testimony that a charge of \$500 must be paid in addition to the cost of the fuel for delivery to the mountain laboratories.

*Mr. Cutshall testified that in lieu of entering his receipt of fuel on the station log, he entered it on his personal log. The log, which was placed into evidence by the University, contains an entry in the margin for August 27 which states: "Took approximately 1 gal. gasoline for my motorcycle at c.c."

I do not find the notation persuasive. Its location in the margin suggests that the entry was made after the fact. Although other pages of Mr. Cutshall's log also contain notes in the margin, the other entries are reflective commentary on the

intent to steal the gasoline and intended to pay for it on his next trip to the Bishop headquarters office. However, he did not return to the Bishop office between when he took the gasoline and when he was terminated. He remained in the mountains over the Labor Day weekend, which occurred between when he took the gasoline and when he was terminated.

On August 31, the Saturday of the Labor Day weekend, Mr. Cutshall also took gasoline from the University tank at Barcroft. On that occasion he notified one of the employees that he was going to take the gasoline and entered the amount on the fuel log with the notation "bill to DC."⁵

During the summer of 1991, the gasoline log at Crooked Creek was kept in a trailer used as an employee lounge and sometime sleeping quarters. The log was a yellow legal tablet with lines drawn on it. It was attached to a clipboard and usually could be found on a table in the trailer. There was testimony that it occasionally got covered with magazines and newspapers. Mr. Trydahl testified that on the day he terminated Mr. Cutshall he found the log in the employee lounge under some books. At some point during the summer of 1991, it also was located beside a telephone in the main building at Crooked Creek.

entries in the body of the log. The entry for gasoline, by contrast, is a factual notation, not a commentary.

⁵There is one significant difference between the gasoline pumps at Crooked Creek and Mt. Barcroft. The Crooked Creek pump is operated by hand, 10 cranks to the gallon. The Barcroft pump is electrically operated and gives exact readings of the amount of fuel taken.

At the time of the gasoline incident, employees at Crooked Creek were working ten-hour days, four days a week. The last day of the four-day shift was Thursday, August 29. On that day, Kevin Ball approached a co-worker, David Lee, told him what he had seen and asked for advice. Mr. Lee urged Mr. Ball to report the incident to their supervisor, Mr. Trydahl, but Mr. Ball was reluctant. Mr. Ball said that although he felt it was theft and he should do something, he was reluctant to report a co-worker.

Shortly thereafter, Mr. Lee went to Mr. Trydahl and told him about the incident without identifying the informant.

Mr. Trydahl guessed that it was Mr. Ball. On learning of the accusation, Mr. Trydahl contacted John Reese of the employee relations department at UCLA and asked for advice. Mr. Reese told him that if the witness would make a written statement, Mr. Trydahl should terminate the employee who took the gasoline.

Mr. Trydahl then visited Mr. Ball who confirmed that he had seen Mr. Cutshall take the gasoline. Mr. Trydahl asked if Mr. Ball were willing to make a written statement. Mr. Ball asked for the weekend to think it over. The day after Labor Day, Tuesday, September 3, Mr. Ball provided Mr. Trydahl with a written statement.

Mr. Trydahl again contacted Mr. Reese at UCLA who said that he should terminate Mr. Cutshall. Mr. Trydahl raised the issue of whether the small amount of gasoline had any bearing but Mr. Reese replied that theft is theft and the value is not an issue. Mr. Trydahl went to Crooked Creek on September 3,

terminated Mr. Cutshall and gave him one hour to secure his belongings and depart from University property.

After Mr. Cutshall was terminated, the UCLA employee relations administrators decided that since Mr. Cutshall was a long-term employee, he was entitled to a pre-termination hearing. They directed Mr. Trydahl to revise Mr. Cutshall's status to investigatory leave. Accordingly, Mr. Cutshall was placed on investigatory leave and a Skelly⁶ hearing was held on October 23 at UCLA.

The Skelly hearing was conducted by Clarence A. Hall, Jr., UCLA dean of physical sciences and director of the White Mountain station. Also present were Mr. Cutshall, an attorney from Local 501 who represented him and a University attorney. At the hearing, Mr. Cutshall's attorney argued that there was no evidence that Mr. Cutshall had any intent to steal the gasoline. Nevertheless, after the hearing Dean Hall directed that the termination go forward. On October 28, the dean sent a letter to Mr. Cutshall terminating him for theft effective that date.

The policy on employee gasoline use changed significantly after a University investigation and audit in 1988. Prior to 1988, control of gasoline inventories was loose. Many gasoline pumps were not locked and numerous keys were in circulation for the pumps that were locked. Gasoline inventories were not monitored and there was no system of accountability for the use

⁶See Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14].

of gasoline, gasoline credit cards and University vehicles. At least one employee used University gasoline with regularity.⁷

The University audit was triggered at least in part by a letter sent to Director Hall by Gail Smith, then administrative assistant to Mr. Trydahl. In the letter, she raised a number of complaints about Mr. Trydahl's operation of the White Mountain Research Station. The subsequent audit resulted in a report recommending, among other things, stricter accounting for the use of University vehicles, gasoline and gasoline credit cards. The report recommended that locks be placed on gasoline pumps and that usage logs be kept for all gasoline pumps. The report recommended further that inventories of gasoline be monitored and that a regular system of reconciliation be instituted to ensure that supply matched usage.

Following the University audit, Mr. Trydahl received a letter of reprimand for his lack of control over accounting and financial matters. He was directed to institute control systems necessary to address the problems found by the audit. He also was instructed to become familiar with and to follow University policies. Mr. Trydahl testified that five or 10 years ago he

⁷Dale Sandell, a building worker at Crooked Creek, was given permission by Mr. Trydahl to fuel his motorcycle at Crooked Creek. An expert motorcycle rider, Mr. Sandell commuted to the high elevation facilities via Silver Canyon Road, a power line access trail that extends up the side of the mountain. By traveling via Silver Canyon, Mr. Sandell was able to get from Bishop to Crooked Creek in 30 to 45 minutes. This arrangement was of advantage to the University because it freed the University vehicle he formerly used for the commute. Mr. Sandell had the arrangement from 1984 to until he was laid off in 1988.

might have handled the accusation of gasoline theft differently but as a result of the audit he follows "the rules and the policy of the University as I understand them."

After the audit, Mr. Trydahl issued a written policy on the use of fuel directing that fuel dispensed at the high altitude facilities be entered on a fuel log for miscellaneous vehicles. However, the policy made no statement about employee use of fuel, about whether employee use was to be approved in advance or how payment was to be made by employees who used fuel.

Mr. Trydahl testified that the unwritten policy was that employees wishing to use University fuel check with someone at the station first or if possible, contact him. He said employee-purchased fuel was to be entered on the fuel usage logs and employees were to pay for it, preferably at the time it was used or later in Bishop.

No witnesses disagreed with Mr. Trydahl's testimony that employee use of University fuel was to be entered on the fuel logs. However, Mr. Cutshall and two of his witnesses, Casey Wack and Don Buser, all testified that they were unaware of any requirement that employee use of fuel be pre-authorized. They similarly testified that they knew of no rule setting the time or method for payment.

The evidence establishes that employee use of University fuel has been slight since 1988. Other than the incident resulting in Mr. Cutshall's termination, there was evidence of only two other occasions when employees used University fuel.

One occasion took place just prior to Mr. Cutshall's termination in 1991 and the other occurred in 1992. In both instances, employees found themselves short of fuel when they got to the high altitude facilities. In both instances, Mr. Trydahl was contacted prior to the employee usage of the fuel and on both occasions the employees paid for the fuel promptly thereafter.

The parties stipulated that Mr. Cutshall joined Local 501 on or about November 7, 1988, and that on or about the same date he filed a grievance against the University under the Local 501 collective bargaining agreement. This grievance resulted in a stipulated arbitrator's award dated October 16, 1990, under which Mr. Cutshall received back pay of \$15,000 and under which he was rehired in the spring of 1991. The parties stipulated that in July of 1991, Mr. Cutshall made a request for information concerning the terms and conditions of his employment and that of other employees at White Mountain.

In addition to these stipulations, the evidence also establishes that Mr. Cutshall led an attempt by building workers at White Mountain to have their positions reclassified to a higher pay status. He also challenged his reappointment as a casual rather than permanent employee in 1991. The evidence establishes that Mr. Trydahl knew of Mr. Cutshall's grievances, request for information and his role in the attempted reclassification. However, there is no evidence that all of the UCLA administrators who participated in the firing decision also knew of Mr. Cutshall's protected activity.

Mr. Trydahl had been dissatisfied with the job performance of Mr. Cutshall for some time prior to the gasoline incident. Although he had found Mr. Cutshall's job performance very good in the early 1980's he testified that it had started to slip in the two years before Mr. Cutshall was laid off in 1988. Mr. Trydahl believed Mr. Cutshall was not working to his capacity and he had received reports that Mr. Cutshall was constantly complaining about him to researchers and others. He also received reports that Mr. Cutshall was not a team player and did not work well with others.

The evidence also establishes that Mr. Cutshall did not like Mr. Trydahl and was free in letting his views be known. Mr. Cutshall told many people that White Mountain would be better off without Mr. Trydahl. Mr. Cutshall kept a daily log containing his observations about activities and people at White Mountain. He testified that the log "certainly does" contain references to mistakes he believed Mr. Trydahl had made. On one occasion in June of 1988, Mr. Cutshall took a picture of Mr. Trydahl operating a Caterpillar tractor. He testified that the vehicle was not equipped with a roll-over protective system and he took the picture to show a violation of the safety code. On this occasion, Mr. Trydahl warned Mr. Cutshall that he could fire him for taking the picture. Mr. Trydahl testified that he believed Mr. Cutshall should have been doing his own job and not worrying about what Mr. Trydahl was doing. Mr. Cutshall never used the picture and nothing more came of the incident.

Mr. Cutshall attempted to establish retaliatory intent by introducing evidence of anti-union statements made by Mr. Trydahl and past retaliatory conduct. Both Mr. Cutshall and his witness, Mr. Wack, testified that they had heard Mr. Trydahl make negative comments about unions. Specifically, they testified that he had bragged about keeping a union out at his prior work place, that he said he did not like unions, and that Local 501 would not assist them in the attempted reclassification.

Just prior to his employment with the University in 1981, Mr. Trydahl had worked as a "project manager" at a Caterpillar dealership in Riverside. In that position he led the employer's campaign to defeat an organizing attempt by the Teamsters Union. He acknowledged that his role in defeating the Teamsters "may have come up" in conversation with employees during his first years at White Mountain. Mr. Trydahl denied that he had said he did not like unions but only that he did not like the Teamsters Union.⁸ Regarding his comments about the reclassification, Mr. Trydahl testified that he told the employees seeking the reclassification that he would be surprised if Local 501 supported their effort.

Mr. Cutshall also finds retaliatory intent in two University actions in 1991: 1) the decision to rehire him and Mr. Wack as casual rather than permanent employees after the arbitration, and 2) the work schedule they were given upon reemployment. Prior to

⁸Mr. Trydahl also testified that he had belonged to six different labor unions in his career and had 15 years of total union membership.

the layoff, Mr. Cutshall was a permanent employee at White Mountain. The stipulated arbitrator's award stated that the two men "shall be recalled from layoff on May 1, 1991, or the spring reopening of the Barcroft facility, whichever is earlier." The award makes no mention of whether the employees would be rehired as casual or permanent.

When Mr. Cutshall and Mr. Wack returned to work in May of 1991, they were asked to sign rehire documents which listed them as "casual" employees.⁹ They at first refused to sign the documents but ultimately, on the advice of an attorney for Local 501, they did sign with the notation "under protest." Mr. Cutshall's status as casual employee remained in dispute at the time of his termination with the union attempting to take the matter to arbitration.

Mr. Trydahl testified that all employees at Crooked Creek during the summer of 1991 were casual. He testified that because of a large construction job the University had undertaken to improve facilities at the site, the only employees needed were construction workers. Since the need for them would not be long-term, only casual employees were hired. Since 1988, the

⁹During his reemployment interview, Mr. Cutshall attempted to record the meeting. When Mr. Trydahl objected, Mr. Cutshall stated that he had been told by Sandra Rich of the UCLA labor relations office that this was permissible. Based upon that representation, Mr. Trydahl consented to the tape recording. Later, he was told by Ms. Rich that she had not given permission for the conversation to be recorded. On May 13, Mr. Trydahl sent Mr. Cutshall a "written warning" which accused Mr. Cutshall of dishonesty and warned that future dishonesty could result in termination. Mr. Cutshall testified that he had been given permission but had misidentified the person who gave it.

White Mountain Station has employed only three permanent, year-round employees, Superintendent Trydahl, his administrative assistant and a caretaker.

Finally, Mr. Cutshall presented evidence that when he and Mr. Wack were rehired in May of 1991, they initially were told they had to make a daily commute to Crooked Creek. Mr. Cutshall said this would have meant a four-hour daily commute. Since the Crooked Creek construction crews worked four 10 hour days each week, this would have required 14 hour days. It also would have required two daily altitude changes of 6,000 feet with accompanying physiological effects.

The daily commute requirement was not unique to Mr. Cutshall and Mr. Wack. All employees at Crooked Creek were assigned the same schedule. Mr. Trydahl testified that he ordered the daily commute to avoid the potential that the University might be required to provide a daily per diem allowance of \$25 to employees required to stay overnight. The White Mountain center previously had been found in violation of Fair Labor Standards Act requirements because it had not provided per diem allowances for employees required to stay overnight on the mountain. The daily commute requirement met with widespread dissent among all workers and it was abandoned. Employees were told they could stay overnight at Crooked Creek if they desired but that since it was at their own option, no per diem allowance would be provided. As a result, employees brought sleeping equipment, including personal tents, to Crooked Creek for use throughout the season.

LEGAL ISSUE

Did the University of California terminate Daniel Cutshall in retaliation for protected activities, and thereby violate section 3571(a)?

CONCLUSIONS OF LAW

Higher education employees have the protected "right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" ¹⁰ Under section 3571 (a) , it is unlawful for a higher education employer to "[i]mpose . . . reprisals on employees, to discriminate . . . or otherwise to interfere with, restrain, or coerce employees because of their exercise of [protected] rights"

In order to prove an allegation of discrimination, the charging party must first demonstrate that the aggrieved employee engaged in protected conduct. The charging party must then show

¹⁰HEERA section 3565 provides in its entirety as follows:

Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

that the employer knew of the employee's protected act¹¹ and that the employer took an adverse action against the employee. The adverse action cannot be speculative but must be an actual harm.

(Palo Verde Unified School District (1988) PERB Decision No. 689.)

Upon a showing of protected conduct and adverse action, the party alleging discrimination must then make a prima facie showing of unlawful motivation. Under Novato Unified School District (1982) PERB Decision No. 210, unlawful motivation occurs where an employer's action against an employee was motivated by the employee's participation in protected conduct.¹² Motivation is determined by a review of direct and circumstantial evidence to see whether, but for the exercise of protected rights, the disputed action would not have been taken against the employee.¹³

¹¹Moreland Elementary School District (1982) PERB Decision No. 227.

¹²Indications of unlawful motivation have been found in many aspects of an employer's conduct. Words indicating retaliatory intent can be persuasive evidence of unlawful motivation. (Santa Clara Unified School District (1979) PERB Decision No. 104.) Other indications of unlawful motivation have been found in an employer's: failure to follow usual procedures (Ibid.); shifting justifications and cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); disparate treatment of a union adherent (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); timing of the action (North Sacramento School District (1982) PERB Decision No. 264); and pattern of antagonism toward the union (Cupertino Union Elementary School District (1986) PERB Decision No. 572). :

¹³See Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 727-730 [175 Cal.Rptr. 626]; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enf., in relevant part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. This test was adopted for higher education employees in

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the respondent to produce evidence that the action "would have occurred in any event." (Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730.) Once employer misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

It is undisputed that Mr. Cutshall engaged in protected activity. He led an attempted job reclassification in 1988. He joined Local 501 and filed a grievance in 1988 under the Local 501 collective bargaining agreement with the University. This grievance led to a stipulated arbitrator's award granting Mr. Cutshall back pay of \$15,000. He also challenged the University's decision to rehire him as a casual employee when he returned to work in 1991 after the arbitrator's stipulated award. Finally, Mr. Cutshall made a request for information in 1991 concerning the terms and conditions of his employment and that of other employees at White Mountain.

It is undisputed that Mr. Trydahl knew of Mr. Cutshall's role in the reclassification attempt, his grievances, the arbitrator's award and the request for information. It is

California State University (1982) PERB Decision No. 211-H.

self-evident that Mr. Cutshall suffered real harm when he was terminated by the University on October 28, 1991.

The key question here is whether the termination of Mr. Cutshall occurred because of his protected activities. The primary evidence of unlawful motivation can be found in indications of animus toward unions on the part of Mr. Trydahl and other possibly discriminatory acts.¹⁴ Indications of animus arguably may be found in spoken words and a past history of opposition to unions. Other possibly discriminatory acts include Mr. Trydahl's decision to reinstate Mr. Cutshall as a casual employee after the stipulated award of the arbitrator and the burdensome commute requirement placed on Mr. Cutshall and Mr. Wack after they returned to duty in May of 1991.¹⁵

The University contends that not all persons who participated in the decision to terminate Mr. Cutshall knew of

¹⁴Mr. Cutshall also argues that he was the victim of disparate treatment in that he was fired for taking gasoline whereas the University freely allows researchers to take gasoline. This contention misstates the rationale given by the University for the firing. The University fired Mr. Cutshall because he allegedly took the gasoline without any intent of paying for it, i.e., stole it. There is no evidence that researchers were allowed to take gasoline without paying for it.

¹⁵In his brief, Mr. Cutshall lists a series of grievances and other disputes he has had with the University as evidence of discrimination. Some of these items are barely touched in the record, others are remote in time, others involve events which have occurred after the termination. The evidence at the hearing focused upon Mr. Trydahl's statements and supposed past history of opposition to unions, the rehiring of Mr. Cutshall and Mr. Wack as casual employees after the arbitration award and the daily commute requirement imposed upon Mr. Cutshall after his return to work. These events provide the central evidence of discrimination and this decision will focus upon them.

all of his protected activities. Moreover, the University- argues, the evidence establishes that Mr. Cutshall knew of the University's policies on the personal use of fuel but did not follow them. This would support a conclusion, the University continues, that Mr. Cutshall did not intend to pay for the gasoline. Finally, the University argues, Mr. Cutshall's protected conduct was remote in time from his termination and no anti-union bias or prior discriminatory activity on the part of Mr. Trydahl was established.

The University makes the more persuasive argument. The evidence of Mr. Trydahl's opposition to unions is remote in time to the events at issue. He has been employed by the University since 1981 and his involvement in a campaign against the Teamsters Union predates his University employment. Comments that Mr. Trydahl made about keeping the Teamsters out of the Caterpillar dealership date from his early years at the University, long before 1991. There is no evidence Mr. Trydahl ever made a negative comment about Local 501 and his comment about the reclassification request was nothing more than a statement of opinion.

The evidence of past conduct is similarly unpersuasive. That Mr. Cutshall and Mr. Wack were rehired as casual employees is consistent with the status of all other employees working at Crooked Creek in 1991. The stipulated arbitration award, while directing that Mr. Cutshall be rehired, was silent about whether his status would be casual or permanent. The award did not

direct that Mr. Cutshall be reinstated immediately but rather that he be returned to White Mountain the next season. One could infer from the return date that it was understood the job was to be seasonal. Alternatively, one likewise could infer from the back pay award that Mr. Cutshall was to be returned to the same permanent status he held before the 1988 layoff. Because of the ambiguity in the stipulated award, I cannot find in the University's decision to rehire Mr. Cutshall as a casual employee evidence sufficient to establish retaliatory intent.

Finally, I find no evidence of retaliatory motivation in the initial requirement that Mr. Cutshall commute to his job at Crooked Creek in 1991. The requirement was not placed solely on Mr. Cutshall and Mr. Wack. All employees working at Crooked Creek were directed to make the commute. The rule that all employees make the commute is consistent with the University's contention that the decision was made solely to avoid a Fair Labor Standards Act requirement for per diem pay. There was no disparate treatment.

The parties argue vigorously over whether the alleged theft of gasoline was the true motivation for the termination of Mr. Cutshall. Mr. Cutshall sees the alleged theft as a bogus justification to remove him as an active participant in protected activities. The University contends that theft is theft and under UCLA policies, the University had no alternative course.

There could have been any of a number of motivations for the firing, including suspicion of theft, that would not violate the

HEERA. Mr. Trydahl might simply have wanted to get rid of an employee who criticized him regularly to others, told others that the White Mountain station would be better off without him, took pictures of Mr. Trydahl in supposed safety violations and kept a log in which Mr. Trydahl's supposed mistakes were recorded. Or Mr. Trydahl might have fired Mr. Cutshall because he believed Mr. Cutshall's job performance was unsatisfactory, that he was a loner when a team player was what was needed to complete the construction at Crooked Creek. Or, as the University asserts, Mr. Trydahl might have fired Mr. Cutshall for theft of gasoline because theft--no matter what the amount--is considered so serious at UCLA that termination is the only alternative.

It is not necessary here to decide whether the alleged theft of gasoline was the true motivation for the firing or to choose among various other possible motivations for the termination. Nor am I entitled to weigh, as would an arbitrator, the issue of whether the University had just cause to terminate Mr. Cutshall. The only question in these proceedings is whether the true motivation was because of Mr. Cutshall's protected conduct. On the evidence in this record, I cannot conclude that but for his protected activity Mr. Cutshall would not have been fired. Since PERB does not have authority, like an arbitrator, to decide that termination is too harsh a punishment for the theft of a gallon of gasoline, I have no authority to do anything but dismiss the complaint.

Accordingly, the complaint and the companion unfair practice charge must be dismissed for failure to establish a prima facie case. It is unnecessary, therefore, to consider other University defenses.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge LA-CE-308-H, Daniel Cutshall v. Regents of the University of California, and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding.

Proof of service shall accompany each copy served on a party or
filed with the Board itself. (See Cal. Code of Regs., tit. 8,
secs. 32300, 32305 and 32140.)

RONALD E. BLUBAUGH / _____
Administrative Law Judge